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Supreme Court, U.S.
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No. 91-52

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

SHIRLEY MIDDLETON,

Petitioner,

-against-

CESAR PERALES, as Commissioner of the New York State Department of Social Services, and WILLIAM GRINKER (as successor to HARVEY ROBBINS), as Commissioner of the New York City Department of Social Services,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT

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ARGUMENT

I. THE CITY AGENCY'S BRIEF IGNORES THE CONSTITUTIONAL ISSUE CREATED BY THE FAILURE OF THE APPELLATE DIVISION TO REACH OR CONSIDER PETITIONER'S FEDERAL CLAIM, THEREBY VIOLATING THE SUPREMACY CLAUSE.

1. The failure or refusal to consider the federal claim cannot be the basis for denying attorneys' fees under 42 U.S.C. §1988.

The city agency is opposing the instant petition on the ground that petitioner did not raise a substantial federal claim warranting an award of attorney's fees because she did not show that the city agency had a policy or practice of not complying with fair hearing decisions in a timely manner. In making such an argument, the city is completely evading the primary basis upon which petitioner is seeking review of this case and is asking this Court to decide an issue never even reached by the Appellate Division in New York.

The entire thrust of the instant petition is that the Appellate Division in this and in many other cases is failing even to acknowledge the existence of federal claims advanced by recipients of government benefits who are seeking attorney's fees after prevailing on the merits. As discussed in the petition, the Appellate Division in this case held that petitioner was not entitled to attorney's fees because the proceeding merely involved the application of state statutes and regulations. In reaching its conclusion that petitioner failed to show a violation of her rights under federal law, the

court made absolutely no reference to the federal claims alleged under the Food Stamp regulations and the Due Process clause of the United States Constitution. In doing so, the Appellate Division totally disregarded the requirements set forth by this Court in *Maher v. Gagne*, 448 U.S. 122, 100 S.Ct. 2570, 65 L.E.2d 653(1980), for determining whether a prevailing party is entitled to attorney's fees where relief was sought on both federal and state grounds.

In *Maher*, this Court noted that if a plaintiff prevails on a claim for which fees may not be awarded, the lower court must decide whether the federal claims alleged warrant an award of attorney's fees, 448 U.S. at 133, n.15, 100 S.Ct. at 2576, n.15. Fees may be awarded if one of the federal claims meet the substantiality test of *Hagens v. Lavine,* 415 U.S 528, 94 S.Ct. 1342, 39 L.E.2d 577 (1974) (see Petition, pp. 20-21) and arose from the same nucleus of facts as the state claim on which plaintiff prevailed.

What this Court is being asked to review in the instant petition is the Appellate Division's repeated failure to make the required determination as to whether any of the federal claims alleged are substantial. By simply concluding that a proceeding involves state law only, without even considering the merits of the federal claims asserted, the Appellate Division is ignoring the dictates of *Maher v. Gagne, supra*, in violation of the Supremacy Clause. As this Court has made clear, when a state court action seeks to enforce federal law, the Supremacy Clause requires the state court "...to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected." *Felder v. Casey*, 487 U.S. 131, 151, 108 S.Ct. 2302, 2313, 101 L.E.2d 123 (1988), quoting from *Garrett v. Moore-McCormick Co.*,

317 U.S. 239, 245, 63 S.Ct. 246, 251, 87 L.E.2d 239 (1942). Far from protecting the crucial federal rights asserted by recipients of government benefits, the Appellate Division has been discriminating against these rights, pretending that they do not exist.

The city agency's argument that the petition should be denied because the petitioner did not assert a substantial federal claim is, therefore, a disingenuous attempt to divert this Court's attention from the serious constitutional issue raised. Moreover, the City is asking this Court to make the very decision that the Appellate Division was required to render in the first instance, but never did. As the city undoubtedly knows, this is not the proper function of this Court. The question of whether petitioner has to demonstrate a policy or practice of non-compliance with hearing decisions in order to establish a substantial federal claim must first be addressed by the Appellate Division.

2. Petitioner alleged substantial federal claims warranting an award of attorney's fees.

If this Court were to consider the merits of the federal claims alleged, it should find that they meet the substantiality test of *Hagens v. Lavine, supra.* As discussed in the petition, the failure of the city agency to comply with her hearing decision until more than four and one-half months after the decision was issued and ten months after the hearing was requested, violated federal Food Stamp regulations which directly command local agencies to comply with decisions within federally specified time periods. 7 C.F.R. Sec. 273.15(c)(1). Additionally, these regulations provide that the

state agency has the ultimate responsibility for ensuring timely compliance. 7 C.F.R. Sec. 273.15(s).

In view of the above-mentioned federal regulations, it is totally erroneous for the city agency to contend that compliance with hearing decisions is governed solely by state law (see brief, p.18). The mere fact that parallel state regulations also were violated in no way renders the subject of fair hearing compliance a matter of state law only. Rather, these provisions merely give further effect to rights that are created by federal law and are enforceable under 42 U.S.C. Sec. 1983.

It was also shown in the petition that the respondents lengthy delay in complying with petitioner's hearing decision may have constituted a violation of her due process rights under the U.S. Constitution. In *Fusari v. Steinberg*, 419 U.S. 379, 389, 95 S.Ct. 533, 540 (1975), this Court maintained that the length of wrongful deprivation of government benefits is an important factor in determining the due process that is required. It is certainly conceivable that a court may have found that the city agency's four and one-half month delay in complying with petitioner's hearing decision violated her due process rights. This is particularly so given the city agency's blatant refusal to comply at all, prior to the commencement of this lawsuit.

In attempting to demonstrate that petitioner's federal claims are not substantial, the city agency cites the New York case of *Misuraca v. Perales*, 120 A.D.2d 592, 501 N.Y.S.2d 907 (2d Dept. 1986). In that case, the court held that petitioner was not entitiled to attorney's fees because her only federal claim was insubstantial and the "failure to comply with

state regulations, without more, does not implicate an interest secured by the laws of the United States." 120 A.D.2d at 593-94, 501 N.Y.S.2d at 909.

The petitioner in *Misuraca* contended that her due process rights were violated at her fair hearing because the city agency did not produce the person who made the determination to reduce her benefits. The court maintained, however, that since there were no factual issues in dispute and the decision turned solely on the correct interpretation of a state regulation, there was no need for petitioner to cross-examine witnesses. Thus, the court held that she was not deprived of due process, and consequently, she did not present a substantial federal claim for attorney's fees purposes. 120 A.D.2d at 594, 501 N.Y.S.2d at 909-10.

In contrast to *Misuraca*, the petitioner in the instant case asserted a substantial violation of her right to timely compliance with her decision under federal food stamp regulations. Moreover, if necessary, the lower court may have found that the lengthy delay constituted a violation of her due process rights. Accordingly, *Misuraca* is inapposite to the instant proceeding as it illustrates nothing more than a case where the petitioner's only meritorious claims were under state law.

The city agency's reliance on *Oberlander v. Perales*, 740 F.2d 116 (2d Cir. 1984), is also misplaced. The plaintiff in that case alleged that the reduction in patient reimbursement rates violated its rights under federal statutes and the Constitution. The court dismissed the statutory claim, emphasizing that it was based entirely on alleged violations of the State's medicaid regulations. In reaching its conclusion,

the court rejected plaintiff's contention that since the State's medicaid plan must conform to the federal Medicaid statute, a violation of any part of the State plan is also a violation of the federal law. *Id.* at 119.

Oberlander, supra, is easily distinguishable from the instant case since as the Second Circuit noted, the plaintiff did not allege that any federal laws were violated. In sharp contrast, the petitioner herein claimed that the defendants violated her rights under very specific federal regulations governing compliance with fair hearing decisions concerning food stamps.

3. Petitioner could have established the existence of a policy or practice of untimely compliance with fair hearing decisions if given the opportunity to do so.

Although the issue of whether the respondents had a policy or practice of non-compliance with hearing decisions was one for the Appellate Division to decide in the first instance, petitioner could have demonstrated the existence of such a policy or practice if she had been required to do so. She was never given the opportunity, however, since the lower courts never addressed the issue.

In support of its contention that petitioner could not show such a policy or practice, the city agency cites *Moore v. Perales*, 85 Civ. 1638 (CPS) memorandum opinion and order (E.D.N.Y. June 27, 1988), in which the court found that the city timely complied with 95% of hearing decisions involving public assistance benefits and 90% of decisions concerning food stamps. These statistics, however, can easily be

considered from the reverse perspective, revealing that there was untimely compliance in a large number of cases. One can reasonably argue that wrongfully impairing the ability of one in ten persons to eat, or one in twenty family's ability to pay rent or clothe their children constitutes a practice of noncompliance in violation of the recipient's federal rights.

Additionally, petitioner may have been able to establish through discovery that the State agency has a policy or practice of taking no meaningful action to ensure compliance with fair hearing decisions. The record in this case already contains evidence showing that the State did virtually nothing to compel compliance with petitioner's hearing decision aside from sending the city agency a tracking sheet about one week after the decison was rendered. It appears that the state agency took no further action even after it received a memorandum from the city agency stating that the decision would not be implemented.

The Appellate Division, however, did not give petitioner the opportunity to demonstrate that either the State or City agency has a practice of failing to ensure timely compliance with hearing decisions. Therefore, if this Court believes that it is necessary for petitioner to establish the existence of such a practice in order to be awarded attorney's fees, it is respectfully requested that this case be remanded to the Appellate Division for this purpose.

II. THE STATE AGENCY'S BRIEF ALSO IGNORES THE CONSTITUTIONAL ISSUE CREATED BY THE APPELLATE DIVISION'S FAILURE TO APPLY ESTABLISHED FEDERAL DECISIONAL LAW FOR EVALUATING ATTORNEYS' FEES CLAIMS UNDER 42 U.S.C. §1988.

The abbreviated brief submitted by Respondent Perales adopts the arguments which have been set forth in the brief of the City agency, and have been refuted hereinabove.

It also advances the unique argument that another case (*Thomasel v. Perales*, 161 A.D.2d 646 (2d Dept. 1990), leave to appeal granted, 77 N.Y.2d 808(1991) will soon be heard by the New York Court of Appeals which case deals with the State Agency's duties to compel the City agency to comply with the orders of the former.

The State's brief herein, like that of the City Agency, completely ignores the heart of petitioner's claim; that the Appellate Division cannot deny attorney's fees by the simple expedient of refusing to reach and consider the petitioner's federal claim at all. To do so violates the controlling decisions of this Court. *Maher v. Gagne, supra; Hagens v Lavine, supra; Felder v. Casey, supra.*

CONCLUSION

For the reasons stated herein, and in the Petition for Writ of Certiorari, this Court should grant a writ of certiorari to review and reverse the decision of the New York State Supreme Court, Appellate Division, Second Department.

Respectfully Submitted,

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